

# MAYOR & COUNCIL AGENDA COVER SHEET

**MEETING DATE:**

September 17, 2002

**RESPONSIBLE STAFF:**

Mark DePoe, Planner

**AGENDA ITEM:**

(please check one)

	Presentation
	Proclamation/Certificate
	Appointment
X	Public Hearing <b>**Joint**</b>
	Historic District
	Consent Item
	Ordinance
	Resolution
	Policy Discussion
	Work Session Discussion Item
	Other:

**PUBLIC HEARING HISTORY:**

(Please complete this section if agenda item is a public hearing)

Introduced	
Advertised	8/28/2002
	9/04/2002
Hearing Date	9/17/2002
Record Held Open	Indefinitely
Policy Discussion	

**TITLE: Z-294**

**MAP AMENDMENT: Rezoning of a Portion of Parcel 910 (23.3 acres) and Outlot 1B (0.1 acres)**

**SUPPORTING BACKGROUND:**

Gary Unterberg, Rodger Consulting, Inc., on behalf of BP Realty Investments, LLC, ("Applicant"), is requesting to rezone a portion of Parcel 910 (23.3 acres) and Outlot 1B (0.1 acres) located northwest of the intersection of MD Route 355 Watkins Mill Road from the I-3 (Industrial Office Park) Zone to the C-2 (General Commercial) Zone.

The Applicant has selected the optional method for the Map Amendment Application, Per Section 24-198 of the Zoning Ordinance and the Applicant has submitted a Schematic Development Plan (SDP) as part of the rezoning application. The SDP proposes approximately 73,000 – 105,000 Square Feet of Office, Service, Retail, Restaurant and Service Station Uses.

The optional method of rezoning is a technique that allows a property to be rezoned with specific covenants and restrictions to the uses and development standards on the land. The SDP limits development standards to less than the maximum permitted and/or limits the land use of the applicant's subject property to one or more of the permitted uses in the requested C-2 zone. The covenants shall indicate in specific language that the subject property is restricted in its use and/or development standards to the SDP and any accompanying or qualifying text material and recorded in the land records of Montgomery County.

Following the public hearing, the Staff will work with the applicant to revise the SDP and proposed declaration of covenants for the property that addresses the City Council, citizen and Staff concerns. At such time a declaration of covenant is in final draft form, staff will schedule a policy discussion.

**Attached:**

- Exhibit 1: Map Amendment Application
- Exhibit 2: Memorandum in Support of Rezoning Request
- Exhibit 3: List of Adjacent Property Owners
- Exhibit 4: Proposed Declaration of Covenants
- Exhibit 5: Section 24-198, of the Zoning Ordinance
- Exhibit 6: Schematic Development Plan

**DESIRED OUTCOME:**

Hold Public Hearing. Keep Record Open Indefinitely.  
Determine if Work Session is Necessary.

## AMENDMENT TO THE ZONING MAP

In accordance with Chapter 24, Article VIII of the City Code

Application No. Z-	<u>294</u>
Filing Date	<u>6-25-02</u>
Fee	<u>1340<sup>00</sup></u>
PC Hearing	_____
PC Recommendation	_____
M & CC Hearing	_____
Decision	_____
Date	_____

**SUBJECT PROPERTY** Part of Parcel 910 & Outlot 1B

Address (if none, the location with respect to streets) Northwest intersection of MD Rte 355 & Watkins Mill Rd.

Lot N/A Block N/A Subdivision N/A

**REQUESTED CHANGE**

From the existing I-3 Zone to the C-2 Zone

☒ Optional Method of Development (check if applicable)

\*Note: The optional method is excluded from the RA Zone and the MXD Zone.

**APPLICANT(S)** BP Realty Investments, LLC

Address 10000 Falls Road, Suite #100 Telephone 301-299-2099  
Potomac, MD 20854

**OWNER(S)** See Attached Sheet

Address \_\_\_\_\_ Telephone \_\_\_\_\_

**TAX ASSESSMENT INFORMATION**

As shown on the tax docket of the State Department of Assessment and Taxation, Montgomery County, or on the Montgomery County, Maryland Real Estate Tax Bill.

DISTRICT SUBDIVISION	ACCOUNT NUMBER	LOT	BLOCK	ACRES/FEET	SUBDIVISION OR TRACT NAME
9- 09	02214641	1B	A	0.1 ac ±	Tektronics
9- 09	00818245	P910	- -	23.4 ac ±	
9-					
9-					
9-					
9-					

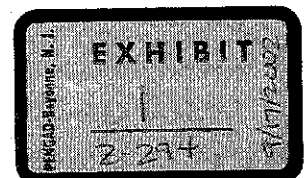
**ZONING HISTORY**

List below the application numbers, date of filing, and actions taken on all applications filed within 3 years prior to this date for the reclassification of the whole or any part of the land above described.

APPLICATION #	DATE FILED	ACTION TAKEN
N/A	N/A	N/A

continued on reverse side

3/97



## SUBMISSION REQUIREMENTS

- **Map or plat** prepared by registered surveyor or engineer showing land and existing buildings for which the map amendment is sought, the bordering properties, streets and street names, lot and block designations, north arrow and key map, age and location of existing buildings, property size in acres/square feet. The area which is the subject of the application should be outlined in red. (10 copies)
- **Legal metes and bounds** of property
- **Fee** (see separate schedule)
- **List of names and addresses** of all property owners within 200 feet of any boundary of subject property
- **Statement** demonstrating a change in the neighborhood or a mistake in the Master Plan

### *If Optional Method submit also:*

- **Schematic Development Plan** (which needs to include):
  - Uses of all buildings and structures
  - Location, height, dimensions of all buildings, structures, and parking areas, dimensions of all buildings
  - Location of points of access to site
  - Existing topography (contours of not more than 5-foot intervals) 100-year flood plains, and other natural features
  - Utility Easements
  - Natural Resource Inventory (See Environmental Standards)
- **Proposed Covenant**
- **Statements:**

*Applicant proposes to limit uses on the subject parcel to the following:* Office, Restaurant, Commercial,  
Service Station, Industrial, Research

*Applicant has submitted Schematic Development Plan which imposes the following limitations of development standards:*  
see attached covenant

## ADDITIONAL INFORMATION

Within five (5) days after filing the application, the applicant shall erect appropriate signs, posting notice of the requested zoning map amendment public hearing (per Section 24-196e of the City Code). The signs are made available to the applicant from the City staff and must remain posted until thirty (30) days after the decision on the application.

**I have read and complied with the submission requirements and affirm that all statements contained herein are true and correct.**

Applicant's Signature

*Gary F. Unterberg, agent*

Date

*6/20/02*

Owner's Signature

*Gary F. Unterberg, agent Rodgers Consulting, Inc.*

Date

**BEFORE THE MAYOR AND CITY COUNCIL OF GAITHERSBURG, MARYLAND**

**In the Matter of the Application of  
BP REALTY INVESTMENTS LLC  
For Rezoning to the C-2 Zone Under the  
Optional Method of Applications**

**Zoning Application No. \_\_\_\_\_**

**MEMORANDUM IN SUPPORT OF REZONING REQUEST**

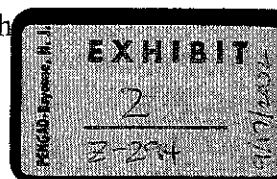
BP Realty Investments, LLC is applying for rezoning to the C-2 classification under the optional method of application for property located in the northwest quadrant of North Frederick Avenue and Watkins Mill Road Extended. Accordingly, the Applicant submits the following information in support of its requested rezoning.

**Zoning and Land Use History**

1. The Subject Property is currently zoned I-3, Industrial and Office Park;
2. The existing City of Gaithersburg Neighborhood Six Land Use Plan was adopted in December 1996, and recommended the I-3 zoning for the property. However, the Land Use Plan also called for the property to be designated as "commercial/industrial-research-office", and called for the "development of the site for commercial retail facilities (that) could possibly include a hotel", while also permitting the "expansion of the office and research and development uses".
3. More recently the City of Gaithersburg approved the Frederick Avenue Corridor Master Plan, which proposes the Subject Property be developed as a mixed-use development, where the "Uses should include commercial, residential and retail".

**Transportation**

1. At the time of the City's 1996 Neighborhood Six Land Use Plan, the City had begun investigating the feasibility of constructing a much needed new road at Watkins Mill Road Extended to connect Route 355 with Route 117 which Montgomery County had proposed, designed, but then abandoned when the land could not be obtained from the property owners.
2. More recently, the Maryland State Highway Administration (SHA) adopted the role to construct the Watkins Mill Interchange, which will again require both



land for and construction of Watkins Mill Road leading up to Interchange to be performed by others.

3. Within the past 18 months the SHA (i) has received final approval of environmental study for the project, (ii) conducted the required public input sessions, (iii) selected the final alignment for the interchange including preliminary design standards, and (iv) received Federal Highway Administration (FHA) concurrence on the plan and design, placement and alignment.
4. The Watkins Mill Interchange project also received both the City of Gaithersburg's and Montgomery County Council's vote of approval and support.

#### Liquor License

1. At the time of the 1996 Master Plan, the City of Gaithersburg, along with many upcounty areas, were unable to attract national restaurant operators due to Montgomery County's longstanding restrictive liquor license regulation, that effectively required these restaurant operations to chose between a location downcounty in the more established areas of Rockville and Bethesda or the upcounty areas such as Gaithersburg;
2. The Gaithersburg community, employees of the area, the business community, and the Mayor, City Council and Planning Commission have for many years sought a change to this restrictive legislation to encourage more national restaurant operators to come into the City;
3. As a result of these efforts, the liquor licensing legislation was recently changed to permit a restaurant operation a separate license for the City of Gaithersburg, thus making Gaithersburg a more attractive locale for restaurant operators.

#### Change or Mistake Standard

To support a change in the City's adopted Zoning Map, Maryland case law seeks a demonstration that there has been a change in circumstances since the last comprehensive zoning, or a "mistake" in the comprehensive zoning, that justifies an amendment of the current zoning on a specific parcel of land. The City requests that an applicant submit a statement "demonstrating a change in the neighborhood or a mistake in the Master Plan."

In reviewing such an application for a Zoning Map Amendment, the municipality will take into account facts specific to a particular parcel of land and the existing Land Use Plan. For instance, in the case of the subject property, the 1996 Neighborhood Six Land Use Plan contemplated a mix of uses including retail/commercial that would include restaurant uses. The I-3 zoning classification was left on the subject property in 1997, during the comprehensive rezoning as a "holding zone" until a local map amendment was filed that would be consistent with the Land Use Plan's recommendations. Therefore, the quantum of "change or mistake" that may be required in this situation is generally deemed to require a lower threshold, since the Land Use Plan intended, and in fact, invited, a request to change the current zoning.

Case law in Maryland also indicates that the quantum of "change or mistake" necessary to support a rezoning is greater when one is rezoning from a more "intense" classification (such as commercial) to a less "intense" classification (such as residential), and lesser for the reverse. In this instance, the subject application is a rezoning request from industrial (the most intense generic category of land uses) to a less intense (restricted commercial) usage. Therefore, again, the quantum of evidence necessary to support a finding of "change or mistake" in the subject application is minimal.

The following are evidence of change sufficient to justify the requested rezoning

1. Recent approval of the Watkins Mill Interchange by the City, County, SHA and FHA,
2. Recent approval of the required Environmental Report for Watkins Mill Interchange;
3. Completion of the design and selection of the Watkins Mill Road Alternative, including Road location, width and preliminary design approval;
4. A recent change in the alcoholic beverage control laws now allow a separate liquor license to be issued to restaurants wishing to come to Gaithersburg. This constitutes a significant "change in circumstances" which justifies the requested rezoning to the C-2 classification to allow development and operations of restaurants that are desired by the residents of the City of Gaithersburg. Previously, the number of restaurants that would locate to the City of Gaithersburg was limited due to the restrictions of the alcoholic beverage control laws. The subject property is well positioned to provide

this category of land use and attract these users that require freestanding facilities to locate in the City.

5. The IBM property that adjoins the site to the south was recently Concept Plan approved for a 1 million square foot office complex.

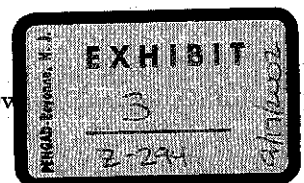
For the reasons set forth above, the Applicant requests that the City rezone the subject property from the I-3 to the C-2 classification with the development restrictions proposed by the applicant.

Part of Parcel 910 and Outlot 1B  
Gaithersburg, MD  
MXD Zoning, April 2002

Adjacent Owners

<u>Parcel</u>	<u>Owner</u>	<u>Address</u>
N860	IBM Corporation	c/o W Spinei 44 S. Broadway White Plains NY 10601-4411
N526	Humane Society of the United States	2100 L St. NW Washington, DC 20037-1525
N417	Humane Society of the United States	2100 L St. NW Washington, DC 20037-1525
N391	Colonial Pipeline Co.	PO Box 18855 Atlanta, GA 31126
P370	Potomac Electric Power Co.	2000 Pennsylvania Ave. NW Ste 4500 Washington, DC 20006
P182	Potomac Electric Power Co.	2000 Pennsylvania Ave. NW Ste 4500 Washington, DC 20006
P195	City of Gaithersburg	31 S. Summit Ave. Gaithersburg, MD 20877
N216	McCormick Realty LTD PTNSHP	c/o Kimco Realty Corp. 3333 New Hyde Park Rd. #100 New Hyde Park, NY 11042-1205
N220	Monumental Corp.	25 South Charles St. Baltimore, MD 21202
N326	% Town & Country Management	100 South Charles St. Baltimore, MD 21201
N327	% Town & Country Management	100 South Charles St. Baltimore, MD 21201
N320	% Town & Country Management	100 South Charles St. Baltimore, MD 21201
N441	Aschenbach, Conrad V.	c/o King Linc-Merc-Merkur 953 N. Frederick Ave. #7540 Gaithersburg, MD 20879-3303

Y:\776A1\Adjacent Ov





## DECLARATION OF COVENANTS

THIS DECLARATION OF COVENANTS is made this \_\_\_\_\_ day of \_\_\_\_\_, 2002 by BP REALTY INVESTMENTS, LLC ("BP REALTY").

WHEREAS, the Code of the City of Gaithersburg, Maryland provides in Section 24-198 (Zoning Ordinance) for an optional method of application for local zoning map amendments in which an applicant may limit a development standard to less than the maximum permitted in a requested zone, or the applicant may limit the land use of the property to be rezoned to less than all of the uses permitted in the requested zone; and

WHEREAS, BP REALTY has submitted to the City of Gaithersburg a local map amendment zoning application seeking C-2 zoning for a parcel of land located within the boundaries of the City of Gaithersburg ("Subject Property") identified on Exhibit A attached hereto and incorporated herein by reference, said zoning application having been designated by the City of Gaithersburg as Zoning Application \_\_\_\_\_; and

WHEREAS, it is the intention of BP REALTY in Zoning Application No. \_\_\_\_\_ to limit the development standards and the land uses of the C-2 zone for the Subject Property to less than the maximum permitted in the C-2 zone; and

WHEREAS, Section 24-198(b) of the City Zoning Ordinance requires the filing with a zoning application under the optional method of development of a covenant specifying the manner in which the property to be rezoned is to be restricted in its development standards or use.

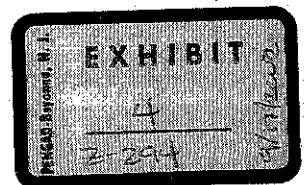
NOW, THEREFORE, BP REALTY hereby enters into this Declaration of Covenants for the purposes stated above and declares as follows:

- I. The Subject Property shall be developed, constructed, operated, maintained and used subject to the following restrictions:

A. Uses.

Uses permitted on the Subject Property shall be all of those uses permitted by right or by special exception in the C-2 zone as it exists as of the date of rezoning of the property to the C-2 zone, or all uses by right or by special exception that may be thereafter added to the C-2 zone, except the following:

1. Retail stores and shops containing more than 25,000 square feet of gross leasable floor area.
2. Private clubs, lodges and recreational buildings.



3. Animal hospitals, animal boarding places and pet shops.
4. Sales and service of automobiles, mobile homes, farm equipment and marine equipment.
5. Cocktail lounges, dance halls, bowling alleys, billiard parlors, theatres, ice and roller skating rinks, and similar places of indoor amusement.
6. Funeral homes
7. Fire stations
8. Automobile, truck and transport vehicle rental
9. Child or elderly day care facilities accommodating not more than eight individuals
10. Bed and breakfast
11. Dwelling units which are part of buildings intended for commercial use
12. Drive-in theaters
13. Automobile paint and body repair shops
14. Care homes

B. Development Standards

The Subject Property shall be developed at less than the maximum standards permitted in the C-2 zone as of the date of rezoning of the Subject Property as specified below:

1. Yard requirements.

Yard requirements will be as shown on the Schematic Development Plan approved by the City Council, or as it may be amended in the future.

2. Building Height.

Building height shall not exceed thirty-eight (38) feet

3. Floor Area Ratio.

Floor area ratio measured on the entire Subject Property shall not exceed 0.25.

- II. The restrictions and limitations set forth herein shall only become applicable and binding upon the effective date of the rezoning of the entire Subject Property to the C-2 classification and shall remain in effect thereafter until a) any part of the Subject Property is rezoned, or b) this

Declaration of Covenants is modified with the approval of the City of  
Gaithersburg.

IN WITNESS WHEREOF, BP REALTY has hereunto set its hand and seal the  
date first above written.

BP REALTY INVESTMENTS, LTD.

By:

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(d) *Action of the council.* The council shall take action on the application within ninety days after the hearing. If the council shall fail to do so, the application shall be deemed to have been denied.

(e) *Notice to applicant and planning commission of action of council.* Notice of action taken by the council on any amendment to this chapter or to the zoning map shall, within seven (7) days thereof, be transmitted to the applicant and to the planning commission by the city manager.

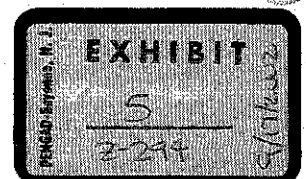
(f) *Fees.* Each application to amend the zoning map shall be accompanied by a fee in accordance with a schedule of fees established by the council by resolution.  
(Ord. No. O-2-65, art. 4; Ord. No. O-13-78; Ord. No. O-16-82)

**Sec. 24-198. Optional method of application for local map amendments.**

(a) In addition to the other requirements contained in this article and notwithstanding subsection (c) of section 24-196 of this Code, an applicant for a local map amendment to any zoning district except the R-A Zone and the MXD Zone may select an optional method for such application by so indicating on the appropriate application form and submitting a schematic development plan as part of the rezoning application. The schematic development plan shall be for the purpose of limiting a development standard or standards to less than the maximum permitted in the requested zone and/or limiting the land use of the applicant's subject property to one or more of the permitted uses in the zone. Approval by the council shall not be for a manner of development or use other than that for which has been applied. A schematic development plan consisting of a drawing of appropriate scale submitted for the purpose of limiting a development standard or standards and/or land use shall include upon such plan, as a minimum, the following as applicable to the property:

- (1) The use or uses of all buildings and structures.
- (2) The location, height and approximate dimensions of all buildings and structures.
- (3) The location of points of access to the site.
- (4) The location of parking areas.
- (5) Existing topography, including:
  - a. Contour intervals of not more than five (5) feet;
  - b. An approved forest stand delineation and forest conservation plan, as defined in Chapter 22 and required by section 22-7 of this Code;
  - c. One hundred-year floodplains;
  - d. Other natural features, such as rock outcroppings and scenic views; and
  - e. Utility easements, if any.

(b) All applications filed under the optional method of application for local map amendment shall also include a proposed covenant, suitable for filing in the land records of the county, which shall indicate in specific language that the property which is the subject of the



application is restricted in its use and/or development standards to the schematic development plan and any accompanying or qualifying text material submitted with such plan, as such plan may be approved or modified by the planning commission at the time of final site plan review. The covenant to be filed in the land records shall also indicate that such restrictions shall be in effect until such time as the property may be rezoned, at which time such restrictions shall be removed.

Upon approval of such application, the covenant shall be immediately recorded and certification thereof shall be submitted to the planning commission at the time of submission for final site plan review.

(c) The schematic development plan may be amended:

- (1) At any time before review and recommendation by the planning commission;
- (2) At any time after planning commission review and prior to council action by resubmission to the planning commission for further review and recommendation;
- (3) Subsequent to council action to approve as follows:
  - a. *Change in use involved.* By either the filing of a new application or resubmission to the planning commission for further evaluation, public hearing and recommendation to the council. The council shall approve or disapprove the recommendation of the planning commission, without the necessity of a public hearing, no later than forty-five (45) days after receipt of the commission's recommendation or may, on its own motion, extend such time limit.
  - b. *No change in use involved.* By submission to the planning commission for evaluation and approval in accordance with Article V of this chapter.
  - c. *Changes other than to use.* By either the filing of a new application or resubmission to the planning commission for further evaluation, public hearing and recommendation to the council when the change is to proposed new development or modification to existing development which:
    - (i) Increases the height of building or signage by ten (10) feet or more, or
    - (ii) Materially changes the orientation or siting of buildings, parking accessory uses, or
    - (iii) Increases nonresidential building floor area by more than ten (10) percent or five thousand (5,000) square feet whichever is greater, or
    - (iv) Increases by more than ten (10) percent or five (5) units the number of residential dwelling units whichever is greater, or
    - (v) Removes more than five (5) percent of area designated for conservation or other environmental preservation purposes.

The council shall hold only a courtesy review of the application, presented by the city planning staff, prior to action by the planning commission. The council shall either:

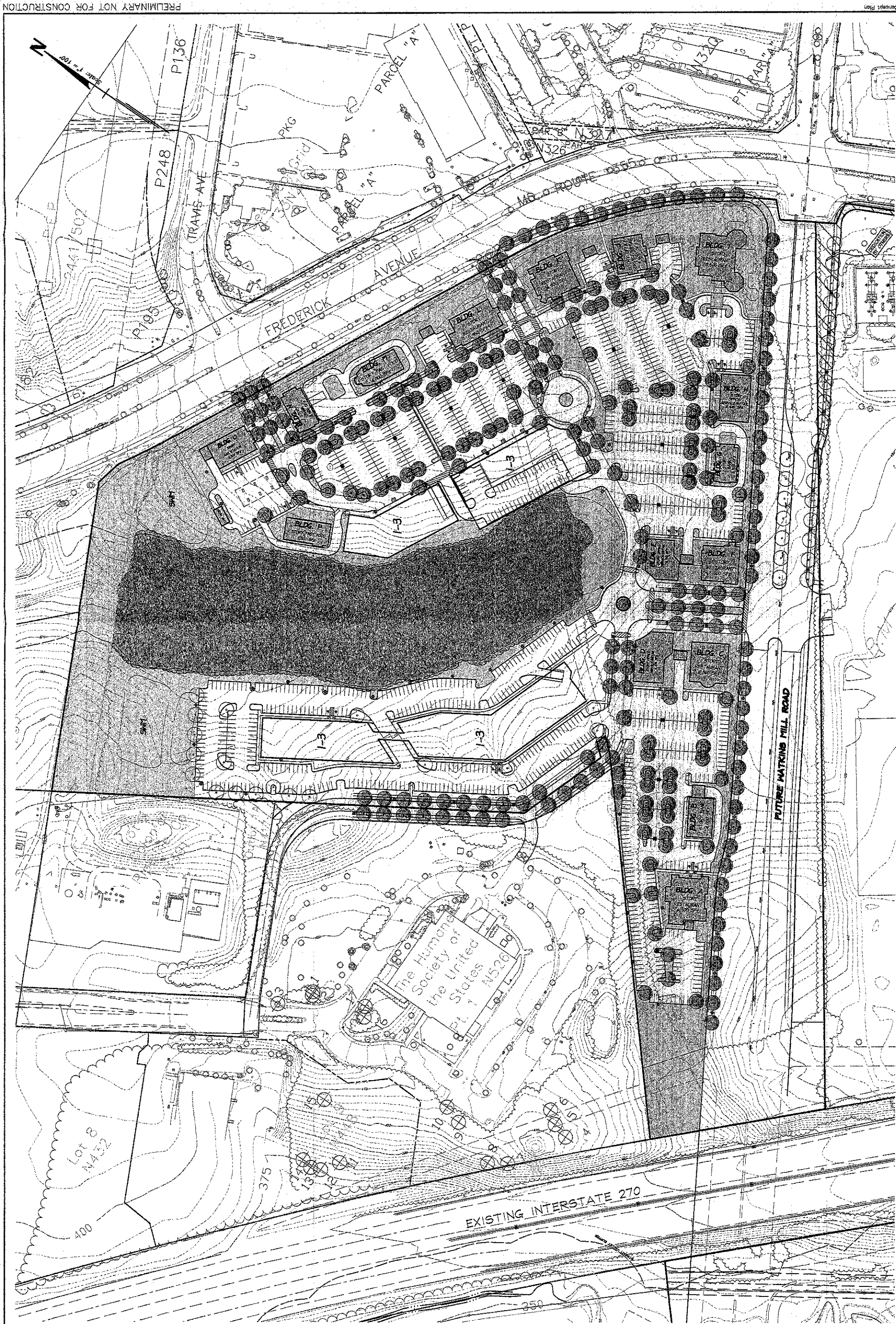
- (1) Find that the application has a minor effect and thereby direct the planning commission to make a final decision on the amendment in accordance with the procedure set forth above in subsection 24-198(3)b.; or
- (2) Direct that the amendment be referred to the planning commission for further evaluation, public hearing and recommendation. The council shall thereafter approve or disapprove the recommendation of the planning commission without the necessity of public hearing, no later than forty-five (45) days after receipt of the commission's recommendation or may on its own motion, extend such time limit.

(d) The final site plan as required by Article V of this chapter must be in conformance with the schematic development plan as approved by the council, with the exception of amendments or modifications not involving a change in use requested pursuant to subsection (c)(3) of this section.

(Ord. No. O-31-80; Ord. No. O-7-82; Ord. No. O-22-84, 11-19-84; Ord. No. O-19-90, 9-17-90; Ord. No. O-15-91, 7-1-91; Ord. No. O-23-92, 12-7-92; Ord. No. O-5-01, 3-19-01)

#### **Sec. 24-199. Appeals.**

Any person or persons aggrieved by any zoning action of the city council shall have the right of appeal, exercisable within thirty (30) days from the date of the decision or action, to the Circuit Court for Montgomery County, Maryland, and thereafter to the appellate courts of the

[illegible]

Part of Parcel 910 and Outlot 1B